the methyl bromide, and they are the Manager of the plaintiffs and the defendant. There are only two firms in Singapore doing fumigation, the plaintiffs and the defendant's firm, Fumigation & Pest Control Co. Ltd. It is clear that if the defendant is not allowed to operate the plaintiffs would have a virtual monopoly in Singapore as regards the fumigation by hydrogen cyanide and methyl bromide. In fact prior to the defendant's firm coming into existence the plaintiffs were the only firm in Singapore doing fumigation. It is of course against public policy to allow any particular trade to be monopolised. It is said by the plaintiffs that if there are more fumigators the immediate effect would be that in order to make fumigation pay there will be temptation to cut on expenses, like the amount of gas used and the number of men employed, with the result that the general service given to the public would deteriorate. Well, the evidence adduced before me is that, since the defendant's firm commenced business in competition with the plaintiffs, the charges for ship fumigation have dropped, which is a good thing, but there is no evidence that the standard of fumigation of ships has deteriorated. Of course if the standard fell the licensing authority has the power to cancel or suspend the operator's licence. I think the fears of the plaintiffs are unfounded.

After considering the evidence that I have before me, I am of the view that there should be more than one firm of fumigators in Singapore and that to prevent the defendant from carrying on as a fumigator would be unreasonable in reference to the interests of the public.

Now, the question then arises whether the covenant in this case, which not only prevents the defendant from carrying on the business of Fumigator but also of White Ant Exterminator, is void as being unreasonable in reference to the interests of the public. From the authorities it is clear that the covenant is valid if it is severable. Now, is the covenant severable and does it consist of two distinct covenants, one relating to the business of White Ant Exterminator and the other relating to the business of Fumigator? I do not think so. The plaintiffs are not carrying on two businesses but one business and there is really one covenant for the protection of the plaintiffs' whole business and not two covenants for the protection of the plaintiffs' two businesses. As it is a single covenant it cannot be severed so as to allow its enforcement in part; *Attwood* v. *Lamont*[3]. I am of the opinion, therefore, that the covenant is unreasonable in reference to the interests of the public and is void.

For the reasons I have given, this action fails and it must be dismissed with costs.

Action dismissed.

Solicitors: *Drew & Napier; Lee & Lee.*

DAUD v. IBRAHIM

[C. A. (Hill and Good JJ.A. and Hepworth J.) July 13, 1960]

[Penang — F.M. Civil Appeal No. 36 of 1959]

Practice and Procedure — Summons-in-Chambers — Res judicata — Kedah Limitation Enactment (No. 60) — Limitation Ordinance, 1953.

This was an appeal from an order of Barakbah J. on an application by way of summons-in-chambers to vary an order of the First Division of the High Court of Kedah made on February 17, 1940 which application was allowed by the learned Judge.

Held: (1) once the Magistrate had arrived at a decision which was upheld by the First Division of the High Court in the appellate jurisdiction the matter became *res judicata* on the principle in *Raja of Ramnad* v. *Velusami Tevar*[1], and as such the present High Court has no power to vary an order of the former High Court of Kedah;

(2) the summons in chambers was barred by limitation.

Per Good, J.A.: ". . . . . the purpose of the proceedings commenced by the summons-in-chambers here was to obtain execution of a judgment. Such proceedings must, under the Kedah Limitation Enactment (No. 60) which was repealed on February 18, 1953 be brought within twelve Muslim years from the date of the judgment; and, under the Limitation Ordinance, 1953 which came into force on February 19, 1953, within twelve Gregorian years from the date on which the judgment became enforceable."

Cases referred to:—

(1) *Raja of Ramnad* v. *Velusami Tevar & Ors.* A.I.R. 1921 P.C. 23.

(2) *Hatton* v. *Harris* [1892] A.C. 547, 564.

COURT OF APPEAL.

N. Sharma (*R. K. Sharma* with him) for the appellant.

S. Natha Singh for the respondent.

Good J.A. (with whom **Hill J.A.** and **Hepworth J.** agreed): This is an appeal from an order of Barakbah J. on an application by way of summons-in-chambers to vary an order of the First Division of the High Court of Kedah made on the 17th February, 1940, which application was allowed by the learned Judge.

The present respondent was the plaintiff in a Civil Suit filed in the Magistrate's Court in Alor Star in 1938 against two defendants of whom the second defendant is the present appellant.

The learned Magistrate in a judgment delivered on the 12th July, 1939, found:—

(1) that the respondent had bought a piece of land from the first defendant twelve years previously and had paid for it and had gone into occupation of it and continued in occupation until the date of the judgment;

(2) that after the respondent had bought and paid for the land the first defendant had sold it to the present appellant, although the appellant knew that the land had already been bought by the respondent.

On these findings of fact the learned Magistrate ordered the appellant to transfer the land to the respondent.

The appellant appealed to the Second Division of the High Court and his appeal was dismissed. He then appealed to the First Division of the High Court and this appeal was also dismissed.

The appellant, however, took no steps to transfer the land to the respondent in obedience to the order of the learned Magistrate as upheld by the final appellate Court. The order of the learned Magistrate contained no provision for compelling the appellant to transfer the land or for enabling it to be transferred if the appellant refused or neglected to transfer it. The order of the appellate Court made no reference to how effect was to be given to the Magistrate's order; it simply upheld the Magistrate's order as it stood.

The respondent took no steps to execute his judgment until the 5th January, 1959, when he made an application to the Alor Star Magistrate for an order calling upon the appellant to show cause why he should not be compelled to execute a transfer of the land in the respondent's favour. This application was dismissed by the Magistrate on the 13th January, 1959, on the ground that it was statute-barred. The respondent did not appeal from the Magistrate's decision but, instead, took the course of making an application to the High Court by summons-in-chambers dated the 11th February, 1959, for an order varying the order of the First Division of the High Court dated the 17th February, 1940, by the addition of the following words:—

"And the Court doth further order that the 2nd defendant/appellant do transfer the land comprised in Surat Akuan No. 331/51 situate in the Mukim of Tualang, District of Kota Star to the plaintiff/respondent and in default whereof the Assistant Registrar of this Honourable Court be and is hereby empowered to sign the Memorandum of Transfer on behalf of the 2nd defendant/appellant".

The addition was, of course, designed to enforce the order of the Alor Star Magistrate of the 12th July, 1939.

The learned Judge to whom the application was made took the view that this was a case for the exercise of the inherent power of the Court to vary its own order so as to carry out its meaning or to make its meaning plain. He made an order in terms allowing the application of the present respondent and it is against that order that this appeal is brought.

I do not think it necessary to examine in detail the question of the Magistrate's jurisdiction to try a suit for specific performance in 1939. I am satisfied that Magistrates in Kedah had jurisdiction at that time, subject to a limitation as to the value of the subject-matter which was not exceeded in the present case.

The Courts in Kedah, which were established under the Kedah Courts Enactment (Enactment No. 25) in 1920 were abolished with the repeal of the Enactment by the Courts Ordinance, 1948. Under section 110(2) of the Courts Ordinance, 1948, the High Court established by Clause 77 of the Federation of Malaya Agreement, 1948, became the successor in jurisdiction to the High Court of Kedah, and there seems to be no doubt that the present High Court has jurisdiction, in proper cases, to exercise the power of varying the orders made by its predecessors.

In the present case, however, once the Magistrate had arrived at a decision which was upheld by the First Division of the High Court in its appellate jurisdiction, the matter became *res judicata* and no further step could be taken in the proceedings. If any authority is required for so obvious a proposition, it is to be found in *Raja of Ramnad* v. *Velusami Tevar & Ors.*[1] It follows that the present High Court had no power to vary an order of the former High Court of Kedah where such variation would have the effect of interfering with the order of the Magistrate which is *res judicata*.

On this ground alone I would allow the appeal. But there is another, and equally cogent ground of appeal, namely, that the summons-in-chambers before the learned Judge on the 11th February, 1959, was statute-barred. As I have already observed, the learned trial Judge regarded the application as one for the exercise of his inherent jurisdiction to vary an order so as to give effect to its meaning or to make its meaning plain. But was it really that, and nothing else? In my view, the application was a step in aid of execution of the original decree of the Magistrate, and ought to have been made to the Magistrate alone. It was made to the Magistrate who, rightly or wrongly, dismissed it. The only course open to the respondent at that stage was to appeal, which he elected not to do.

The respondent elected, instead of appealing, to circumvent the decision of the Magistrate in 1959 by starting proceedings *de novo* in the High Court; but here, says the appellant, he was statute-barred. It is true, as the learned Judge has correctly pointed out, that where the question is one of exercising the inherent discretion to vary an order to effect or explain its intention, "lapse of time has nothing to do with the question": *Hatton* v. *Harris*[2]. But the purpose of the proceedings commenced by the summons-in-chambers here was to obtain execution of a judgment. Such proceedings must, under the Kedah Limitation Enactment (No. 60) which was repealed on the 18th February, 1953, be brought within twelve Muslim years from the date of the judgment; and, under the Limitation Ordinance, 1953, which came into force on the 19th February, 1953, within 12 Gregorian years from the date on which the judgment became enforceable. There is no information on which to base a supposition that the Magistrate granted a stay of execution pending appeal. The date from which the period of limitation began to run was, therefore, the 12th July, 1939. Deducting the period of the Moratorium, from the 1st January, 1942 to the 13th September, 1949, the period from the 12th July, 1939, when the original judgment of the Magistrate was given, to the 11th February, 1959, when the summons-in-chambers was filed, was 12 years and 5 days, computed as follows:—

Date of Magistrate's Judgment 12.7.39 = 24.5.58 (Muslim calendar)

Date of repeal of Kedah Limitation Enactment

18.2.53 = 4.6.72 (Muslim calendar)

14 years plus 8 days

Commencement of Limitation Ordinance, 1953

19.2.53

Date of Summons-in-Chambers

11.2.59 6 years minus 8 days

Total period = 20 years

Deduct Moratorium period:

Commencement

1.1.42 = 13.12.60 (Muslim calendar)

Moratorium lifted

13.9.49 = 8.12.68 (Muslim calendar)

Moratorium period 8 years minus 5 days

20 years less 8 years minus 5 days

= 12 years plus 5 days

The summons-in-chambers was therefore barred by limitation, and on this ground also the appeal must be allowed.

I would allow the appeal and set aside the order of the learned Judge dated 24th October, 1959, on summons-in-chambers dated the 11th February, 1959, with costs, including the costs of the summons-in-chambers to the appellant.

Appeal allowed.

Solicitors: *G. H. Goh; Natha Singh & Subbiah.*

HASSAN & ANOR. v. WAN ISHAK & ORS.

[C. A. (Thomson C.J., Syed Sheh Barakbah and Azmi JJ.) September 25, 1960]

[Kota Bharu — F.M. Civil Appeal No. 47 of 1960]

Defamation — Defamatory words in language other than that of the Court — Pleadings.

As a matter of practice when defamatory words are alleged to have been spoken in a language other than the language of the Court these words should be set out in their original form in the pleadings and in addition a translation of them into the language of the Court should be pleaded.

In this case the words complained of were spoken in Malay, but in their statement of claim those words were set out in English. The defendants did not take the point, but denied that they at any time said anything at all about the plaintiffs or either of them. On the issue of credibility the Court below found in favour of the plaintiffs, and awarded damages $750 and costs. On appeal the defendants took the technical point that the precise words of the alleged slander as proved at the trial were not set out in the Statement of Claim.

Held: (1) the point was not only highly technical, but also was devoid of merit. Being raised for the first time on appeal the Court had doubts as to the propriety of allowing it to be thus raised;

(2) although the actual words used in the language in which they were used should have been pleaded the failure to do so could not be held to have been fatal to the case of the plaintiffs. At the trial it was sufficient to prove words that were substantially the same.

Observations on the functions of Judge as trier of both fact and law.

Cases referred to:—

(1) *Bradlaugh* v. *The Queen* 3 Q.B.D. 607.

(2) *Harris* v. *Warre* 4 C.P.D. 125, 128.

(3) *Tournier* v. *National Provincial Bank* [1924] 1 K.B. 461; [1923] All E.R. Rep. 550.

COURT OF APPEAL.

H. Y. Teh for the appellants.

F. C. Arulanandom for the respondents.

Thomson C.J. (delivering oral judgment): This is an appeal from a decision of Hepworth J. whereby he gave the present respondents judgment against the present appellants for defamation.

In their Statement of Claim the plaintiffs said that the defendants spoke certain words of them which were alleged to be defamatory. These words were set out in the English language.

At the close of the plaintiffs' case it was clear that if any words were spoken by the defendants of the plaintiffs these words were not spoken in the English language but were spoken in the Malay language although it is clear that the sense of the Malay words as sworn to by the plaintiffs' witnesses was substantially the same as the sense of the English words that were pleaded.

I pause here to observe that at the trial, assuming no point to have been taken by the defendants earlier by way of demurrer, it would have been wise for the plaintiffs to have amended their Statement of Claim. They did not do so, however, and the trial proceeded. Here, however, it must be borne in mind that the defence as originally pleaded and persisted in and supported by the evidence of the defendants themselves and their witnesses was *non facit*. They did not allege they used words of the plaintiffs other than the words pleaded or other than the words spoken to in evidence by the plaintiffs' witnesses. They did not plead nor did they say that any words they did use of the plaintiffs were incapable of a defamatory meaning. What they did say was that they never at any time said anything at all about the plaintiffs or either of them.

On the issue of credibility thus raised the learned trial Judge found in favour of the plaintiffs. He found that the defendants did utter the words which were sworn to by the plaintiffs' witnesses. He took the view, with which we do not quarrel, that these words were clearly defamatory. He took the view that it was a case for substantial but not unduly heavy damages and he laid the damages at $750 and gave costs on the High Court scale.

Against that decision the defendants have now appealed and their appeal is based on the single highly technical point that the precise words of the alleged slander as proved at the trial were not set out in the Statement of Claim.

In my view this point is not only highly technical, it is devoid of merit and with great respect